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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 845

ETTA MAE FERGUSON, Surety,
Petitioner

versus

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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SUMMARY OF ARGUMENT

The only conclusion that can be reached in this matter is that the collection of the entire forfeiture will result in enrichment of the United States Treasury. Although the default of the defendant was willful, the surety acted in good faith and cooperated with the respondent and did everything within her power to bring about the arrest of the defendant, and it was solely through the effort of the petitioner that the defendant pleaded guilty and thus saved the respondent a long and expensive trial. By virtue of the adoption of Rule 46 (f)(2) the Supreme Court and Congress evidenced an intention to give relief to sureties and remit the forfeiture over and above that amount which is necessary to reimburse the respondent for costs incident to the

default. Where there is absolutely no evidence in the record upon which to base his judgment for the costs expended by the respondent, a judgment in such a large amount as $10,000.00 amounts to an abuse of discretion in refusing to remit any part of the forfeiture of the appearance bond. It was never intended that the forfeiture of appearance bond should result in the enrichment of the United States Treasury. The judgment of the Court of Appeals and of the trial court should be reversed, or, in the alternative, judgment entered in this court for a reasonable sum, or, in the second alternative, the matter should be remanded to the trial court with instructions to take evidence as to the actual costs involved to the respondent.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Etta Mae Ferguson, by G. W. Horsley and L. H. Lenz, her attorneys, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE MATTER INVOLVED

This petition for certiorari challenges the judgment entered against Etta Mae Ferguson by the United States Court of Appeals for the Seventh Circuit on March 10, 1953 wherein that court affirmed the judgment of the lower court in the amount of $10,000.00 resulting from the forfeiture of an appearance bond upon which the Petitioner was the surety.

On March 12, 1952 the grand jury for the District Court, Southern District, Southern Division, State of Illinois, returned an indictment against one Ralph Levi Davis charging him with the violation of the White Slave Traffic Act, Section 2421, Title 18, U.S.C., Section 2423, Title 18, U.S.C. The indictment consists of six counts, each of which alleged the defendant transported a woman across State lines for the purpose of prostitution, debauchery and other immoral purposes. In answer to this indictment, the Defendant on March 31, 1952, entered a plea of not guilty to all of the counts of the indictment and, on the same day, appeared before United States Commissioner Chittenden, whereupon an appearance bond was entered into with Ralph Levi Davis as the principal and Etta Mae Ferguson as surety in an amount of $10,000.00. Thereafter, the Defendant was released from custody.

The case of the United States versus Ralph Levi Davis was called for trial on June 20, 1952 at 10:00 o'clock A.M. and the said Ralph Levi Davis failed to appear for trial. It is stipulated in the transcript of record that both the said Ralph Levi Davis and this Petitioner had notice of the setting of the said case for trial. (Tr. 5.) On that same date the Honorable Charles G. Briggle ordered the forfeiture of the appearance bond and issued a bench warrant for the arrest of the said Ralph Levi Davis.

On July 1, 1952, the Respondent, United States of America, filed a motion for judgment on default of the bail bond which was in the usual sum and asked the Court to enter an order of default on the bond. This matter was continued for hearing until July 9, 1952 at 2:30 P.M.

Defendant was arrested some eight days after his case was set for trial, and on July 8, 1952, was returned to Springfield, Illinois.

On return of the said Davis to Springfield, Illinois, as a result of the efforts of the Petitioner, Davis, after being fully advised of his rights, on July 29, 1952, withdrew his plea of not guilty and entered a plea of guilty to all the counts of the indictment and he was thereupon sentenced.

On July 29, 1952, on the date of the hearing on the motion for judgment by the Respondent United States of America, the Petitioner made an oral plea in the nature of request for remission on this matter, and asked that she not be required to pay the full amount of the bond. (Tr. 12.) After hearing evidence and the argument of counsel, judgment was rendered against the Petitioner in the sum of $10,000.00, which was the full amount of the bond.

Notice of appeal and proof of service on the Respondent was filed on August 8, 1952. A supersedeas bond in the amount of $11,000.00 was filed by the Petitioner and approved by the Court on August 8, 1952 and on August 27, 1952 designation of the contents of the record on appeal and the statement of points relied upon and proof of service of the same on the Respondent was filed. Briefs were subsequently submitted by the Petitioner and Respondent in the Court of Appeals for the Seventh Circuit, oral argument was had in this case on February 20, 1953 and on the 10th day of March 1953, that Court rendered its opinion

and entered a judgment affirming the judgment of the District Court. Pursuant to a motion by the Petitioner on April 8, 1953, the mandate of the Court of Appeals was stayed for thirty days pursuant to Rule 25 of the Court of Appeals for the Seventh Circuit and it was ordered that the Petitioner not be required to file any additional supersedeas bond in connection with her petition for writ of certiorari from this Honorable Court. The Petitioner filed her designation for Supreme Court Record and proof of service on the Respondent on April 15, 1953. On May 7, 1953, the Petitioner was granted a further stay of the mandate for an additional period of thirty days for the purpose of effecting this petition for certiorari.

The Court Has Jurisdiction

In this petition, Petitioner submits that there are several questions which she is presenting and which should be persuasive upon the sound, judicial discretion of this court to allow a writ of certiorari.

The instant case involves an important question of federal law which has not been, but should be, settled by this court.

Petitioner further contends that the Court of Appeals for the Seventh Circuit has sanctioned a departure so far from the accepted usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Questions Presented

The Petitioner contends that the Court of Appeals for the Seventh Circuit committed reversible error in deciding this case under the law which existed prior to the adoption of Rule 46(f)(2), Federal Rules of Criminal Procedure. This law was to the effect that where the default of the

principal on the bail bond was wilful the Court had no discretion to remit a forfeiture of the bail bond, even though the surety had made every effort to aid the government in locating the principal defendant and even though the government was put to little or no additional expense. The Court failed to give proper weight to the evidence on these elements, even though they are material under the present law whether or not the default of the principal is wilful and especially where the Petitioner has persuaded the defendant to plead guilty and save the government the expense of trial after the apprehension of the defendant following his default on the bond.

Petitioner further contends that the Court of Appeals for the Seventh Circuit sanctioned an abuse of discretion under Rule 46(f)2, Federal Rules of Criminal Procedure, on the part of the District Court. That Court failed to remit any part of a forfeiture on a bail bond where the evidence showed that the Petitioner did all in her power to help apprehend the defendant after his failure to appear and by her efforts persuaded the defendant to plead guilty and save the government the expense of an actual trial following the defendant's apprehension, and where there was absolutely no evidence submitted on the part of the government as to the amount of the expenses incurred or the inconvenience to the government because of the defendant's failure to appear for the hearing.

Reasons Relied Upon for Allowance of Writ

Petitioner in her statement of facts has attempted to set up the events which occurred in this case in a very concise manner and so made only a passing reference to the evidence which was heard on the 29th day of July, 1952 in regard to her petition for a remission of the forfeiture on the bail bond. Petitioner intends to more fully

develop the evidence which was presented at that time in her brief which is annexed hereto and made a part of this petition for certiorari. However, she does wish to set forth for the consideration of this court a concise summary of the important facts in this case. Petitioner also calls the attention of the Court to the evidence which was taken on the hearing in regard to the motion of Ralph Levi Davis to modify the judgment entered by the Court against him on July 29, 1952, all of which matters will be developed in the brief annexed hereto. The undisputed facts in this case show:

1. That Ralph Levi Davis did not appear for trial on the 30th day of June, 1952 and that his failure to appear was willful.

2. That the surety and her husband tried diligently, but unsuccessfully, to locate Ralph Levi Davis and affect his return to the Federal authorities.

3. That prior to the setting of the trial on June 30, 1952, said Ralph Levi Davis had pleaded not guilty and evidenced an intention to have a trial on the charges against him and that the said Ralph Levi Davis made that fact known both to Court and to his counsel and in fact the Respondent expected to go to trial at that time.

4. That due entirely to the efforts of the Petitioner, Ralph Levi Davis withdrew his plea of not guilty and pleaded guilty to all six counts of the indictment, none of which was done before his rights were fully disclosed to him by the court.

5. That the Respondent was never put to the expense of a jury trial in this matter and the only possible ex-

pense which they could have incurred was for apprehending Ralph Levi Davis.

6. That in no place in the record is there any evidence as to what the expenses were or in what amounts they were incurred, but it is conclusive that they could not have amounted to very much.

7. That in no place in the record is there any evidence that shows that justice required the enforcement of the forfeiture in its entirety.

In view of these factors Petitioner feels that the Court committed abuse of discretion when it failed to remit a single dollar upon the forfeiture of the bail bond for $10,000.00. The Court so doing certainly did not abide by the intent of Congress under the wording of Rule 46(f)2, Federal Rules of Criminal Procedure and in failing to properly consider these factors the Court of Appeals committed reversible error when it upheld this abuse of discretion by the District Court under the criminal rule involved.

Rule 46(f)2 of Federal Rules of Criminal Procedure is a relatively new rule and did not become effective until March 21, 1946. There have been very few decisions of the District Courts and Courts of Appeal interpreting this section and as far as Petitioner has been able to learn this section has never been interpreted by this Court. Petitioner is not asking this Court to substitute its judgment for the District Court in a matter of discretion. However, she is asking his Court to review a judgment of the District Court and of the Court of Appeals because she feels that an abuse of discretion is clearly shown by the evidence and that this is a proper case in which

this Court can set forth in clear manner the guides for the proper exercise of the court's discretion under Rule 46(f)2 of the Federal Rules of Criminal Procedure.

Respectfully submitted,

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Dated May 29, 1953.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 202 Federal Reporter (Second Series) 621. This opinion is also printed in full in the transcript of record. (Tr. 45-49.)

Jurisdiction

As was pointed out in the petition for writ of certiorari the Petitioner urges this court to take jurisdiction of this matter for the reason that an important question of federal law has not been, but should be, settled by this Court.

The Petitioner believes this Court has not as yet decided any case where a question of abuse of discretion in regard to the exercise of the remission of a forfeiture of a bail bond under Rule 46(f)2 of the Federal Rules of Criminal Procedure was involved. Furthermore, the decision of the Court of Appeals for the Seventh Circuit in affirming what the Petitioner feels is an abuse of discretion by the District Court sanctioned a grave departure from the accepted and usual course of judicial proceedings and that this Honorable Court should exercise its power of supervision of the lower courts by reversing the judgment of the Court of Appeals for the Seventh Circuit and that of the District Court for the Southern District, Southern Division, State of Illinois.

STATEMENT OF THE CASE

A fairly complete statement of the case with regard to the motions and hearings in the District Court and the further proceedings in the Court of Appeals for the Seventh Circuit is contained in the petition for certiorari, ante. Furthermore, the Petitioner has summarized the evidence which she feels shows an abuse of discretion in the reasons relied upon for the allowance of the writ of certiorari which is also contained in the petition.

Briefly, the case involves a decision on an oral motion for a remission of the forfeiture of a $10,000.00 bail bond wherein the Petitioner was the surety. It would, perhaps, be well to set forth the evidence on two or three points which the Petitioner feels demonstrates her right to a remission. First of all, the Petitioner has alleged that she and her husband did everything possible, both to satisfy themselves that Davis would appear for trial and also when he failed to so appear did everything in their power under the circumstances to determine his whereabouts. Petitioner and her

husband had reasonable assurance that Davis was a good risk; in fact, the sheriff of Clinton County, Illinois recommended that Mr. Ferguson, the husband of the Petitioner, go on the bond. (Tr. 16.) Davis failed to appear on the 30th day of June, 1952 and it was only seven full days later that he was arrested by Federal authorities. During this time the record shows that Mr. Ferguson asked the trial judge for a continuance, as soon as he was informed that the Defendant had not appeared for trial on the 30th day of June, 1952 and, when this was refused went for several nights to St. Louis inquiring as to where Davis was. Mr. Ferguson was, of course, cautious in making his inquiry because he did not want to tip Davis off and thus make it more difficult for the F. B. I. to locate him. (Tr. 13.) Furthermore, Mr. Ferguson made three or four trips to Quincy, Illinois and went to St. Louis where he watched certain places and hotels where Davis was likely to be. Also he asked the latter's mother where he was but she did not know. Mr. Ferguson further testified that he had made numerous calls to different people to locate Davis, but without success. (Tr. 14.) He had talked to Davis's people a few days before the trial and to Davis personally, who assured him that he would be there. Mrs. Ferguson, the surety, testified that she helped her husband all she could on these inquiries about Davis. (Tr. 14.) Petitioner calls the attention of the Court to this evidence by Mr. Ferguson because of the fact that the Petitioner is not a professional bondsman, but the wife of a man engaged in that business and since the necessary real property was in her name, she went on the bond at the request of her husband.

The most important question in regard to a remission in favor of the Petitioner is the fact that Davis, a man who admitted his guilt, was persuaded by Petitioner to plead

guilty and thus save the government the expense of a long, drawn out jury trial. Furthermore, this evidence clearly shows that Davis was fully advised of his rights in entering a plea of guilty. It will be noted that while Davis was in jail after his return to the jurisdiction, he wrote a letter to the trial judge asking that an attorney be appointed for him indicating that he expected to continue with his plea of not guilty and demand a trial of this case.

The Court: "Mr. Davis, come forward. I have your letter in which you request the Court to appoint someone to represent you.

Mr. Davis: Yes, sir. But rather than put the expense to the Court, I would plead guilty and put myself on the mercy of the Court.

The Court: Is it your wish to have a lawyer?

Mr. Davis: No, sir.

The Court: How old are You?

Mr. Davis: Thirty-five in September.

The Court: You understand it is your privilege to be represented by a lawyer?

Mr. Davis: Yes, sir.

The Court: You entered a plea of not guilty in March, 1952, at which time Mr. Horsley represented you?

Mr. Davis: Yes, sir.

The Court: Is it your wish now to withdraw that plea of not guilty?

A. Yes, sir.

The Court: You wish to do that without further advise of counsel?

A. Yes, sir. Throw myself on the mercy of the Court." (Tr. 8-9.)

The record further shows that G. W. Horsley, who had been his attorney, had withdrawn by leave of Court on June 30, 1952, the date the case was originally set for trial.

Ralph Levi Davis, himself, stated:

> "Mr. Davis: You can thank Mr. Ferguson that I pleaded guilty." (Tr. 17.)

Thereafter, Davis filed a motion to amend and modify the judgment and there was considerable testimony about the conversations which induced the defendant to plead guilty. This is set out fully in the Transcript of Record and shows conclusively that Davis was guilty of all of the counts of the indictment, but, as he stated, "not to the degree indicated." (Tr. 11.)

So as not to burden this statement of case with too much detail we are reserving our statement in regard to any evidence of the expenses to the government caused by the default of Ralph Levi Davis and also as to any evidence of whether or not public justice required a forfeiture in this case for our argument.

SPECIFICATIONS OF ERRORS ASSIGNED

I. The Court of Appeals for the Seventh Circuit committed reversible error in affirming the judgment of the District Court and the District Court abused its discretion in refusing a remission of any part of the appearance bond where:

1. There is no competent evidence to show any actual expenses incurred by the Government because of the failure of Ralph Levi Davis to appear for trial and the collection of the judgment could only result in an enrichment to the Government over and above any actual expense to the Government.

2. The Petitioner used every reasonable method to ascertain the whereabouts of Ralph Levi Davis after he failed to appear and assisted in attempting to locate Ralph Levi Davis.

3. The Petitioner used every lawful means to persuade Ralph Levi Davis to plead guilty, and he did plead guilty, and thus save the Government additional expense of a trial.

4. Congress has evidenced an intention that remission be allowed in such cases where the surety has done all within his power to apprehend the defendant and has not been guilty of any willful conduct in connection with the failure to appear of the defendant.

II. The Court of Appeals for the Seventh Circuit committed reversible error in affirming the judgment of the District Court because, in so deciding the Court of Appeals applied the law as it existed before the adoption of Rule 46(f)2, Federal Rules of Criminal Procedure, in that it failed to require any evidence of, or consider, the actual expenses of the government because of the default of the principal, even though an inquiry must be made upon that fact under the present law, regardless of whether or not the default of the principal was wilful or not, especially where the surety did all in her power to effect the apprehension of the defendant and secure a plea of guilty thus saving the government the expenses of trial.

ARGUMENT

Summary of Argument; Propositions of Law and Citation of Cases

I.

Prior to 1946 the Court had no discretion in remitting all or part of an appearance bond if the default of the principal was wilfull. Rule 46 (f) (2), adopted in March of 1946, was adopted because of the showing made for the need of same in the opinions of various courts, and shows clearly the intent of the Supreme Court and of Congress that such remission should be allowed in accordance with the facts and circumstances.

Continental Casualty Company v. United States, 314 U.S. 527, 86 L. Ed. 426;

U S. v. Legg, CCA 4th, 157 Fed. 2d 990;

Section 601, Title 18, USC.

II.

The purpose of an appearance bond is to reimburse the Government and not to enrich the treasury.

U.S. v. Feely, 1 Brock (US) 255, Fed. Case No. 15082;

U. S. v. Traynor, 173 Fed. 114, 1909;

U.S. v. Smith, Dist. Ct. W.D.K.Y., 5 F.R.D. 274;

U.S. v. Smoller, 275 F. 1011;

Paris v. U.S., CCA 4th, 137 Fed. 2nd 300.

III.

The intent of the Supreme Court to grant relief to bondsmen, even in cases of willful default by the defendant, is evidenced by the adoption of the new federal rules of criminal procedure.

Rule 46 (f)(2) Federal Rules of Criminal Procedure;

U.S. v. Smith, District Court W. D. Ky. 1946, 5 F.R.D. 274;

U.S. v. DeStephano, 102 Fed. Supp. 39;

Vol. 4, Section 2507, page 419, William W. Barron on Federal Practice and Procedure;

6 Federal Bar Journal, page 18.

IV.

Where there is no substantial evidence to support a contention the Court abuses its discretion in following that contention.

U.S. v. Smart, CCA 7th, 237 Fed. 978;

U.S. v. Drewar, CCA 7th 1946, 158 Fed. 2d 146.

V.

Judgment upon an appearance bond should be only upon the basis of reimbursement and no example should be made of a bondsman simply as such.

ARGUMENT

The issue in this case is clear cut. After the Court entered an order forfeiting the bond, the Government filed a motion for judgment on the bond and the issues were joined by oral motion of the Appellant for a remission of all or part of the bond. The Government offered no testimony whatsoever upon any amount of possible expenditures by the Government in connection with the apprehension and return of the Defendant, while the testimony of the petitioner is undisputed as to the taking of every step possible in ascertaining the whereabouts of the Defendant and persuading him to plead guitly and thus save the Government a large amount of expense in connection with a trial.

We are sure that the Government will concede that if this case had been tried, it would have consumed at least a whole week. There were several dozen witnesses subpoenaed and the expenses of these witnesses would have been tremendous. Since there was no necessity for a trial, the ultimate result is much cheaper from the Government's standpoint than if the Defendant had been tried and found guilty at the time the case was first set for trial. It seems that there can only be one conclusion, and that is that the collection of the full amount of this appearance bond will result in enrichment of the United States Treasury.

There is further no dispute but that the Defendant willfully absented himself from the jurisdiction of the court on the day of trial. Under the rule existing prior to March of 1946 the trial court would have had no discretion whatsoever except to enter judgment for the full amount of the appearance bond. There is no need to burden this Court with a long line of decisions, all of which support this

proposition but the majority of which criticized this rule and inferred that some relief should be given to bondesmen who, in good faith, cooperated with the Government and did everything within their power to bring about the arrest and conviction of the Defendant at no greater expense to the Government.

As a matter of fact, in many instances Congress passed private acts to remit forfeitures to bondsmen.

It was the criticism of the courts about the lack of power to relieve the surety in such situations, and the passage of these private acts, which brought about the change in applicable rules and law.

Prior to March 21, 1946, the applicable statute was Section 601, Title 18, USC, which was as follows:

> "When any recognizance in a criminal cause, taken for, or in or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

In interpreting this statute the courts rightly held that the District Court had no power to remit any part of the forfeiture where the default on the part of the defendant was willful. This was true regardless of the fact that the surety may have used every effort to locate the defendant and even though the Government may have suffered no injury because of the failure of the defendant to appear. The good faith of the surety was of no avail to him where his principal willfully failed to appear. This doctrine was clearly set out in many opinions prior to the adoption of the criminal rules, two of which were *Continental Cas-*

ualty Company v. U. S., 314 U. S. 527, 86 L. Ed. 426; and U. S. v. Legg, CCA 4th, 157 Fed. 2d 990;

The Federal Rules of Criminal Procedure became effective after careful study by an Advisory Committee, aupointed by the Supreme Court pursuant to legislative authority for the purpose of drafting these rules. After the rules were drafted by the Committee, Congress allowed them to become effective without any action, so the legislative intent can only be ascertained by the notes of the Committee and the decisions of the courts which have construed the Federal Rules since their adoption. The present rule covering remission of forfeitures in these cases is Rule 46 (f)(2), which reads as follows:

> "Setting Aside: The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

After the final draft of the rules was adopted by the Advisory Committee, Alexander Holtoff, who was secretary of the Advisory Committee, wrote an article in 6 Federal Bar Journal, page 18, in which he described the purpose of Rule 46 (f)(2). There the author stated:

> "Cases are not infrequent, however, in which the defendant is guilty of a willful default but in which the surety is entirely innocent and cooperates with the prosecution in endeavoring to apprehend the fugitive. Even though the fugitive is rearrested, tried and convicted the court is powerless to ameliorate the plight of the surety and the forfeiture of the entire amount of the bond must stand. In such contingencies, the Congress frequently passes private acts remitting the forfeiture in part, after deducting an amount sufficient to recompense the Government for any expenses incurred by it as a result of the default. The rule would enlarge the discretion of the court and would empower

> it to remit the forfeiture in whole or in part in the interest of justice. Rule 48 (f)(2) and (4)."

Furthermore, the official notes of the Advisory Committee on subdivision (f)(2) of this rule made it clear that the trial court was intended by this rule to have a far greater discretion than it had prior to its adoption, in that it could set aside and remit a forfeiture even though the failure of the principal to appear was willful. It is clear, therefore, from the very wording of the rule that whether or not a remission is to be granted no longer depends on what the principal does, but on what the surety does in helping to apprehend the Defendant when he does not appear.

As was stated by William W. Barron in Federal Practice and Procedure, Volume 4, Section 2507, Page 419:

> "Thus the court may now remit the forfeiture even though the defendant willfully defaulted and may base a partial remission upon considerations of expense and inconvenience to the government."

The cases which have interpreted this section are very few. One is *U. S. v. Smith, District Court W. D. Ky. 1946, 5 F. R. D. 274.* This case involved a petition by a surety for the remission of a forfeiture. The Defendant was charged with the violation of Section 409, Title 18 USCA. The case was set for trial on March 25, 1946 and at that time the Defendant failed to appear and the bond was forfeited. On March 27th, two days later, Smith appeared and entered a plea of guilty and was sentenced. On March 29th the petition for a remission was filed. The amount of the recognizance was $500.00 and the court allowed a remission of $300.00. The court specifically noted, and it was certainly an important point in his decision, that the Government had little, if any, additional expense or inconvenience because of the willful default of the principal,

and the court admitted that his default was willful. The Court said, however:

> "The absence of any reference to 'willful default in Rule 46 and empowering the court to set aside a forfeiture where justice does not require its enforcement, clearly indicated an intention to broaden the discretion of the trial court. Upon the effective date of the Federal Rules of Criminal Procedure, Section 601 of Title 18 became of no further force and effect. Section 688, Title 18 USCA."

The court in fairness to both parties did not feel that the surety should be relieved of the payment of the entire bond and held that the judgment should stand as to $200.00. The Court went on to say:

> "While the purpose of a recognizance is not to enrich the treasury, it must of necessity at all time serve, both in amount and in its enforcement to command obedience to its covenants and undertakings."

The only other case that we have found dealing with this subject since March of 1946 is *U. S. v. DeStephano,* 102 Fed. Supp. 39. In that case the Defendant was arrested and gave $5000.00 bond. The defendant willfully defaulted at the preliminary hearing and was not re-arrested until almost a year later and was then not sentenced for another six months. In that case the Court refused to remit any of the bond. Apparently, the bondsman did little, if anything, to assist in the recapture of the defendant. The court seemed to base its opinion mostly on the fact that the trial and the imprisonment of the defendant was delayed more than a year and therefore, refused any remission.

We have searched diligently and have failed to find any other cases involving the same questions involved in the instant case, and particularly where a surety has done as

much as was done in the instant case in persuading the defendant to plead guilty where he obviously was guilty and thus in effect save the Government a large sum of money.

We frankly state that where matters are left pretty much exclusively to the discretion of the trial judge this court is reluctant to disturb his decision. Nevertheless, we are firmly convinced that this is such an important matter that it should receive the careful scrutiny of this court.

We earnestly beg this Court to give this matter such carefully scrutiny.

It is our firm belief that there must be *some* evidence in the record upon which to base a judgment. Especially, should this be true where all of the facts, circumstances and undisputed evidence show that the ultimate result was the saving of money for the Government in addition to the quick and speedy justice meted out to a man who undoubtedly was guilty, but who could prolong his sentencing by asking for a long drawn out trial and possible appeal.

We firmly believe that the trial court abused its discretion in refusing to remit any part of the forfeiture of the appearance bond. There can be no argument with the fact that under Rule 46 (f)(2), Federal Rules of Criminal Procedure, the matter of a remission of a forfeiture lies within the sound discretion of the court.

However, it would seem that even the language of Rule 46 (f)(2) tempers somewhat the discretion of the court by the use of the words, "if it appears that justice does not require the enforcement of the forfeiture." It would seem that the only fair interpretation to be placed upon this

language is the consideration of the evidence with regard to the expense caused the Government by the failure of the defendant to appear. This same thought, it will be noted, was carried out by Mr. William W. Barron in his work on Federal Practice and Procedure, as hereinabove quoted, where he indicates that the forfeiture may be remitted upon considerations of expense and inconvenience to the Government. If, as we believe, it was the intention of the Supreme Court and also of Congress in the adoption of this Rule, that remissions should be made except for expense caused the Government by the default, then it would seem that the only fair conclusion is that a court which disregards this Rule and fails to remit any of the bond, where there is absolutely no evidence of the expense involved, and where it appears that the net result is a saving to the Government, would be abusing its discretion.

The only cases which have discussed the question of an abuse of discretion were those involving a decision under the prior law as to whether or not the default of the principal was willful. In two cases, *U. S. v. Smart, CCA 7th, 237 Fed. 978*, and *U. S. v. Drewar, CCA 7th 1946, 158 Fed. 2nd 146*, the courts concluded that the decision of the court that the default of the principal was not willful would not be reversed and set aside by the Appellate Court where such decision was supported *by substantial evidence*, although there was evidence to the contrary. No case since Rule 46 (f)(2) was adopted has discussed the discretion of the court and the evidence that must support the court's decision, but we feel that it is reasonable to conclude that the court's decision must be based upon substantial evidence under the new rules. Certainly, the court's order must have some basis under the evidence submitted. We have submitted in the transcript of record the entire evidence which was taken by the court prior to its order deny-

ing the remission and also, the evidence subsequent to it which is pertinent to that question. We feel that the evidence taken as a whole clearly shows that it was an abuse of discretion for the court to fail to remit at least a part of the forfeiture.

How much inconvenience and expense has the Respondent been put to as a result of the Defendant's failure to appear on July 30, 1952? The Defendant was only at liberty from June 30, 1952 to July 8, 1952, at which time he was picked up by the FBI in El Paso, Texas. Furthermore, because of the plea of guilty to all of the counts in the indictment, this matter was concluded as of July 29, 1952, which means that there was a delay of about twenty-nine days. At no time, thus, was the respondent put to the expense of a trial. At no place in the record is there any evidence as to what the Government's actual expenses were. Assistant U.S. Attorney Heckenkamp stated that the computation of the expenses was impossible and then, in the next breath, said that the respondent had Marshal's fees for the subpoena of the witnesses and mileage for the witnesses called for the hearing of June 30, 1952. (Tr. 18.) Certainly, those costs could easily be computed. However, these costs could not be chargeable to the surety. Likewise, he stated (Tr. 18) that there were telephone calls, wires, teletype expenses and the cost of removing the Defendant from El Paso, which could not be estimated. Are we to assume that the respondent has no record of the cost of these items or that proper accounts are not kept? The respondent could have and should have introduced competent evidence to show the extent of these costs. A very important point to remember is that if a trial had been had on June 30, 1952, the expense of summoning witnesses, paying their mileage, and conducting the case, would still have been

incurred and the bondsman would not have been liable for any of these items. Since the Defendant pleaded guilty and no trial was necessary, how can the respondent maintain that it has incurred any expense which it would not have had to incur anyway? The Defendant had originally pleaded not guilty, was represented by counsel, and was apparently ready to stand trial, until the surety, after the Defendant's non-appearance, persuaded him that it would probably be to his best interests to plead guilty. Why should not the respondent introduce the evidence of its expenses? Certainly it is in a better position to know what they are than the surety. Yet, there is not one single piece of evidence on the actual costs and expenses incurred by the respondent, only vague estimations by counsel.

It remains to be determined whether a forfeiture on the bond was necessary because public justice requires it. Counsel for the respondent is apparently inferring this in his argument to the court in the hearing on July 29, 1952 at (Tr. 16-17).

Counsel for the respondent pleaded with the Court that he thought it was time that the respondent began to get tough on bondsmen and apparently make an example of them. There is nothing in this record to indicate that there has been any trouble in this district or any other district with bondsmen or defendants who fail to appear. Is the appellant in this case to be penalized because she happens along at a time when somebody decides to get tough with bondsmen and make an example of her?

The eight days that the defendant was at large constituted some expense to the respondent and there was some expense involved in going to Texas and bringing him back to Springfield. However, we challenge the attorneys for

the Government to even make a statement that these expenses would have been greater than the expense that would have been involved had the trial proceeded on June 30th, or at a later date.

Only one conclusion can be reached in this matter, and that is that if this judgment is allowed to stand the Federal Treasury will be enriched by the collection of the sum of $10,000.00 from the appellant. This practice was early condemned by the Supreme Court of the United States in the case of *U. S. v. Feely,* 1 Brock (US) 255, Fed. Case No. 15082 where Chief Justice Marshal said: "It is not the object of a recognizance to enrich the treasury."

It is true in this case that the Defendant was arrested by the respondent and was not returned by the surety. This is not preclusive of a remission where the bondsman has exercised good faith in trying to locate the Defendant. In *U. S. v. Traynor,* 173 Fed. 114, 1909, the facts were that the Defendant was arrested under an alias capias after the forfeiture of the appearance bond. He was sentenced by the court and served out his term of imprisonment. The court restated the language of Chief Justice Marshal in *U. S. v. Feely,* Federal Case 15082, to the effect that it was not the object of a recognizance to enrich the treasury. It is to be noted that the court remitted all of the original judgment on the bond except such sum as was necessary to satisfy all the costs on the scire facias and the petition for remission *and all costs accrued in the criminal prosecution of the Defendant.*

Again we refer the court to the case of United States v. Smith, supra, both of these last cases having been favorably cited in other cases. In both of these cases the court was concerned with the expenses incurred by the Government. That was one important factor in their decision.

How could the court below then decide the question without having the faintest idea of what the actual expenses were?

Petitioner has made no particular reference to the decision of the Court of Appeals in this case. She feels that she should point out two or three statements which the Court made in that case for the consideration of this Court. On page 5 of the opinion (Tr. 49) the Court said:

> "Although we believe that this is a case where the district court might well have remitted a portion of the amount forfeited, we cannot say that there was an abuse of discretion. * * *"
>
> "This court may feel that the ruling of the district court in failing to remit was *severe or even harsh,* but unless we conclude that such action was arbitrary and capricious, we are not at liberty to grant any relief * * * "
>
> "Nor do we think the government was under any obligation to produce evidence to show *even approximately* the total amount of expenses caused by defendant's default. The court might well have directed an inquiry on this subject, but was under no obligation to do so."

CONCLUSION

It is indeed apparent from the opinion of the Circuit Court of Appeals that that Court felt that the District Court might well have directed an inquiry into the actual expenses incurred by the government because of the default of the defendant. However, that Court did not feel that the District Court was obligated to require the Respondent to present such evidence. It would seem that the Court was thinking in terms of the law as it stood prior to the adoption of Rule 46(f)2, Federal Rules of Criminal Procedure. At that time a great many cases were disposed of

simply on the evidence as to whether or not the default of the principal was wilful. Having found the default wilful, in many cases the Courts then went on to disregard any evidence as to the good faith efforts of the surety to locate the defendant and as to the amount of the expenses and inconvenience to the government caused by the default. Now, however, the Court is authorized under the rules to remit a forfeiture whether or not the default of the principal was wilful. That being the case, it seems inconceivable that the District Court or any other Court could make a proper decision on a remission of a forfeiture without knowing what the default of the principal cost the government in unnecessary expense.

Clearly, the Court of Appeals was relying upon the old law as it existed prior to the adoption of Rule 46(f)2, Federal Rules of Criminal Procedure.

It is further apparent that the Court of Appeals sanctioned an abuse of discretion by the District Court in affirming its judgment denying any remission of the Ten Thousand Dollar forfeiture.

Surely, the Respondent would have had a great deal to say if the Court had remitted, say $5,000.00 of this forfeiture, and not directed any inquiry as to how much expense the Government was out. In such a case certainly the Respondent would have felt as much aggrieved as the Petitioner feels in an opposite result. The failure to direct any inquiry at all and the failure to require the submission of competent evidence on this question was in itself enough to constitute an abuse of discretion, on the facts in this case where the Petitioner did everything possible to cooperate with the Respondent in learning the whereabouts of the Defendant. Furthermore, she saved the Respondent

the actual expense of their attorneys engaging in a long, drawn out trial, because it is undisputed that Ralph Levi Davis pleaded guilty not at the urging of the Respondent, but as a result of the good faith efforts of the Petitioner *alone*.

We respectfully submit that the judgment of the Court of Appeals for the Seventh Circuit should be reversed and set aside and that the case be remanded to the trial court to modify its original judgment and enter a remission of a reasonable amount or that this case be remanded to the trial court for the taking of further evidence to determine what expenses, if any, has been occasioned because of the default of Ralph Levi Davis and judgment rendered accordingly.

Respectfully submitted,

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Dated May 29, 1953.